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No. 97-387

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

SCHUYLKILL ENERGY RESOURCES, INC.,
Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF KOCH ENERGY TRADING, INC. In Support of Petitioner

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11 pp

QUESTION PRESENTED

May a prospective entrant in a market that is currently reserved to a legal monopolist suffer antitrust injury, actionable under Section 2 of the Sherman Act, during the time prior to the opening of that market to competition?

STATEMENT PURSUANT TO RULE 29.1

Amicus is a wholly owned subsidiary of Koch Industries, Inc.

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MISCELLANEOUS

See William G. Shepherd, *Anti-Competitive Impacts of Secret Strategic Pricing in the Electricity Industry*, 135 Pub. Util. Fort. 24, 27 (Feb. 15, 1997) 4

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Brief Amicus Curiae of Koch Energy Trading, Inc. In Support of Petitioner

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INTEREST OF THE AMICUS CURIAE[1]

By virtue of its multi-faceted participation in the world of energy, Koch Energy Trading, Inc. ("KET") is in a good

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[1] The consent of both parties has been obtained and is reflected in letters from authorized counsel filed with this *amicus* brief. Rule 37, Rules of the Supreme Court of the United States. Pursuant to Rule 37.6, *amicus* represents that this brief was authored in whole by counsel for *amicus* and that no other person or entity made a monetary contribution to its preparation or submission.

position to advise the Court about the significance of the first issue raised in the petition filed by Schuylkill Energy Resources: whether a prospective entrant in a market soon to be opened to competition can suffer antitrust injury during the period before deregulation at the hands of the company whose monopoly is about to end? Our experience confirms that this is an issue of nationwide significance in an era of increasing deregulation designed to benefit the consumer of power.

KET's power trading unit was established in 1995 to participate in the deregulation and resulting commoditization of the electricity industry. Physical trading began in September 1995, and volumes have grown to 1,300,000 MWH per month, placing KET among the top twenty of approximately 300 power marketers authorized by the Federal Energy Regulatory Commission ("FERC") to sell electric power at market-based prices.

In recent years, KET has appeared before the Congress of the United States as well as policy makers in the several states to advocate increasing competition in energy markets. In all parts of this country and beyond its borders, KET has been on the frontlines when energy markets historically reserved to gas and electricity monopolists have begun to give way to open entry and competition.

STATEMENT

Amicus adopts the statement of the case set forth in the petition for certiorari.

ARGUMENT IN SUPPORT OF THE PETITION

KET's own experience, derived from activity across the country, confirms that the kind of problem Schuylkill has confronted at the threshold of an emerging market, designed by the incumbent monopolist to damage petitioner as a potential competitor in the new market, is common and calls for an antitrust remedy. The decision below, if allowed to stand, will encourage such predatory conduct by removing antitrust constraints.

Like petitioner Schuylkill, KET's interests as a potential retail competitor in soon-to-be opened markets have been materially harmed by incumbent utility monopolists in anticipation of the introduction of competition in wholesale and retail markets. In Schuylkill's case, respondent PP&L's effort to prolong its monopoly took the form of a sudden increase in contractual instances that excuse performance, thereby depriving Schuylkill of sale revenues and weakening it on the eve of the advent of competition in the market for electricity in parts of Pennsylvania. In KET's experience, the effort of incumbents to extend their monopoly has largely taken the form of strategic price discrimination to lock in customers -- typically large customers who are desirable for their consistency in that their average power purchases do not vary significantly from peak demand. Generally, monopolists have accomplished the lock-in by offering service at prices at or below the variable operating costs of the incumbent. In exchange, the incumbents exact long-term contracts that extend well beyond the upcoming birthdate of competition. This anticompetitive activity has been documented in the trade

press.[2] The incumbent monopolist engaged in this variant of loss-leader activity can afford it because of calculable revenues that will be realized from existing captive customers before monopoly ends.[3]

The lock-in also perpetuates the monopolist's position in the remaining market that is comprised of smaller customers who consume power erratically. A seller of power must combine these customers with other more economically attractive purchasers to produce a relatively even demand over time. Unless the antitrust laws are available to curb lock-in and other predatory activity, it will be very difficult, at the outset of the new competitive era, for new entrants to assemble a serviceable base of customers except at prohibitively high prices. Such a consequence foredooms the rapidly growing number of legislative choices to encourage competition by lifting monopoly protection.

Now is the time that legislatures are particularly active in the deregulation of energy production and sale. As of September 15, 1997, the legislatures of 46 states have either

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[2] *See* William G. Shepherd, *Anti-Competitive Impacts of Secret Strategic Pricing in the Electricity Industry*, 135 Pub. Util. Fort. 24, 27 (Feb. 15, 1997) (identifying deep strategic discounts to large retail customers in New York, Massachusetts, Michigan and California, each of which is soon to introduce retail competition), *see also* Agis Salpukas, *Utilities Rewrite the Rate Card*, New York Times, April 5, 1996, D1, D6.

[3] The offer of the discounted price may also be conditioned upon the retail customer's agreement not to self-generate or cogenerate its own electricity in competition with the incumbent electric utility. The Antitrust Division of the Department of Justice has recently filed a complaint alleging such an anticompetitive tactic. *United States v. Rochester Gas & Elec. Corp.*, Civ. Action No. 97-CV-6294 (filed June 14, 1997).

initiated or completed efforts to bring retail competition to their electrical utility industries. Eight states have enacted legislation to restructure the electric power industry, five states have issued comprehensive regulatory restructuring orders, and 21 states have pending either deregulating legislation or administrative orders. Investigations into restructuring are underway in 12 states. Only in four states is there no ongoing activity to consider deregulation in the market for electric power.[4]

At the federal level, four bills have been introduced in the 105th Congress to substitute competition in retail electricity markets throughout the United States for the monopolies that presently characterize those markets.[5]

Plainly, legislatures in mounting numbers are acting to end electric power monopolies in favor of competition destined to benefit consumers. These efforts will be stymied at the threshold if federal courts are encouraged to follow the Third Circuit in the *Schuylkill* case by reason of this Court's failure to overturn that decision. The time to overturn is now; in many jurisdictions, now is the transition period when anticipatory assaults on competition can achieve their maximum injury to new and potential competitors. The vitality of the antitrust law

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[4] *Status of State Electric Utility Deregulation Activity as of September 15, 1997.* (http://www.eia.doe.gov/cneaf/electricity/chg_str/TAB5REV.html.)

[5] Electric Consumers Protection Act of 1997, S. 237, 105th Cong.; Electric Consumers' Power to Choose Act of 1997, H.R. 655, 105th Cong.; Consumers Electric Power Act of 1997, H.R. 1230, 105th Cong.; Electric Power Competition and Consumer Choice Act of 1997, H.R. 1960, 105th Cong.

must be preserved against decisions like the one below, so that those laws may serve their intended function in clearing the way for competition. This Court should grant the petition for writ of certiorari to send a clear signal that it will stand guard to ensure that opening markets do not remain captive to monopolies.

CONCLUSION

The plight of petitioner Schuylkill is of significance well beyond the confines of this case. Power industry deregulation on a nationwide scale makes the issue that the petitioner presents one of truly national moment. For that reason, the petition for writ of certiorari should be granted.

Respectfully submitted,

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